Filed 9/19/06 Nieblas v. The Bank of New York CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CRAIG ALLEN NIEBLAS,

Plaintiff and Appellant,

v.

THE BANK OF NEW YORK et al.,

Defendants and Respondents.

F048670

(Super. Ct. No. 02-200024)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hara, Judge.

Edwin W. Wilson, for Plaintiff and Appellant.

Kronick, Moskovitz, Tiedemann & Girard, and Bruce A. Scheidt, for Defendants and Respondents.

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Appellant Nieblas was an unsuccessful plaintiff in this civil action against respondents Homeq Servicing Corporation (formerly known as TMS Mortgage, Inc., doing business as The Money Store), the Bank of New York, and Horizon Management Services, Inc. Respondents moved for and obtained an award of attorney fees in the

amount of $65,151.50. Nieblas appeals from the attorney fee award. We find no error and will affirm the order awarding attorney fees.

FACTS

Appellant borrowed money from respondent Homeq. The loan was secured by a deed of trust on a parcel of property located in Porterville. Appellant failed to make the necessary payments on his loan. The real property securing the loan was ultimately sold at a trustee's sale. Appellant then brought this civil action against several defendants involved or allegedly involved in the foreclosure process. The action sought a judicial determination that the trustee's sale was invalid and that appellant still held title to the property. Respondents answered the second amended complaint, and then moved for and obtained summary judgment. Nieblas appealed from the judgment. This court affirmed that judgment in an opinion filed on September 26, 2005.

Judgment was entered in the trial court on June 11, 2004. While Nieblas's appeal from that judgment was pending, respondents on April 15, 2005 filed their motion for an order awarding attorney fees. The court heard the motion on June 30, 2005 and filed its order granting the motion on August 18, 2005.

APPELLANT'S CONTENTIONS

Appellant contends: (1) the court could not properly make an award of attorney fees while appellant's appeal from the judgment was pending; (2) the award of attorney fees was erroneous because respondents were not the "prevailing party" within the meaning of Civil Code section 1717; (3) the court could not properly award attorney fees pertaining to the expungement of the lis pendens appellant placed on the subject property because the court's judgment ordering expungement of the lis pendens was erroneous; and (4) the court could not properly award attorney fees to respondents because the motion for attorney fees was made while a bankruptcy stay was in effect. As we shall explain, we find appellant's contentions to be without merit. We will affirm the award of attorney fees.

I.

Appellant's contention that a court may not make an award of attorney fees while an appeal is pending is simply incorrect. Indeed, this argument is "'inconsistent with statutory authority requiring a prevailing party to move for attorney's fees as an item of cost within a specified period of time after the court enters an order or judgment.'" (*Nazemi v. Tseng* (1992) 5 Cal.App.4th 1633, 1639; in accord, see also *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 360, and *Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 367-368.) "[T]he filing of a notice of appeal does not deprive the trial court of jurisdiction to award attorney fees as costs post trial. Although a prevailing party at trial may not be the prevailing party after an appeal, it has [long] been held that a motion for attorney fees is not premature despite the filing of a notice of appeal." (*Bankes v. Lucas*, *supra*, 9 Cal.App.4th at p. 368.)

II.

Appellant's second argument is merely a rewording of his first argument. He contends that there is no "prevailing party" as long as his appeal from the judgment was pending. Again, he is simply incorrect. (*Bankes v. Lucas*, *supra*, 9 Cal.App.4th 365.).

III.

The court's June 11, 2004 judgment decreed that judgment be entered in favor of respondents and also that "the notice of pendency of action recorded in this action by Plaintiff Craig Allen Nieblas is expunged from the public records …." Appellant argues that the judgment erroneously ordered the expungement of the lis pendens. Appellant's appeal from the judgment has already been decided adversely to him in this court's September 14, 2005 opinion affirming the judgment.

IV.

Appellant's argument that the trial court could not properly award attorney fees to respondents because a bankruptcy stay was in effect when respondents filed their attorney fee motion fails for at least two reasons. First, appellant did not raise this

argument in the trial court and therefore cannot now raise it for the first time on appeal. (See *Doers v. Golden Gate Bridge etc Dist*. (1979) 23 Cal.3d 180, fn. 1 at pp. 184-185.) Second, the U.S. Bankruptcy Court order of March 21, 2005 presented to us by appellant himself states: "Notice is hereby given that the Chapter 13 case for the above named debtor(s) has been dismissed by order of the court and all restraining orders and automatic stays issued in said case have been vacated and set aside."[1] Respondents' motion for attorney fees was filed April 15, 2005. This was after the stay was vacated.

Appellant's reply brief attempts to raise an additional argument not mentioned in his opening brief – a contention that respondents' motion for attorney fees was untimely. We will not consider it. "[P]oints raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before." (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.) "'Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his

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1 Appellant has filed a request for judicial notice asking this court to take judicial notice of the U.S. Bankruptcy Court's order (quoted above) filed on March 21, 2005, the superior court's April 13, 2004 order granting summary judgment, and the superior court's tentative ruling on respondents' motion for summary judgment. The request is unopposed. We grant the request.

Respondent has filed a request for judicial notice asking this court to take judicial notice of our September 26, 2005 opinion affirming the judgment (*Nieblas v. Melmet* et al. (F045770)). The request is unopposed. We grant the request.

Appellant has also filed a request for judicial notice asking this court to take judicial notice of the "Final Decree" and the "Final Report and Account" in each of his two bankruptcy proceedings in the United States Bankruptcy Court for the Eastern District of California. The request is unopposed. We grant the request.

Respondent has also filed a request for judicial notice asking this court to take judicial notice of the California Supreme Court's December 14, 2005 order denying his petition for review of our September 26, 2005 decision affirming the judgment in *Nieblas v. Melmet et al*. (F045770). The request is unopposed. We grant the request.

opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for the failure to present them before.'" (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

DISPOSITION

The superior court's order awarding attorney fees to respondents is affirmed. Costs to respondent.

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Ardaiz, P.J.

WE CONCUR:

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Dawson, J.

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Kane, J.